Office-Supreme Court, U.S.
FILED
MAY 7 1981
ALEXANDER L. STEVAS,
CLERK

80-1871

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN E. HOLLY,

Petitioner,

v.

ROBERT E. CHASEN

and

UNITED STATES CUSTOMS SERVICE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN CARY SIMS
(Counsel of Record)
ALAN B. MORRISON
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

May 7, 1981

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

QUESTION PRESENTED

Does the doctrine of sovereign immunity override, in those cases in which a money judgment is entered against the United States, the express language in 28 U.S.C. § 1961 which authorizes the assessment of interest "on any money judgment in a civil case recovered in a district court"?*

*All parties to the proceeding in the court below are listed in the caption. In addition, the Washington Lawyers' Committee for Civil Rights Under Law filed a brief *amicus curiae* in that court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

JURISDICTION 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT 4

CONCLUSION 13

APPENDIX:

Memorandum and Order of the District Court 1a

Opinion of the Court of Appeals 2a

Judgment of the Court of Appeals 9a

TABLE OF AUTHORITIES

Cases: **Page**

Alyeska Pipeline Service Co. v. Wilderness Society
421 U.S. 240 (1975) 8

Carpa, Inc. v. Ward Foods, Inc.,
567 F.2d 1316 (5th Cir. 1978) 3

City of Detroit v. Grinnell Corp.,
575 F.2d 1009 (2d Cir. 1978) 3

Copeland v. Marshall,
641 F.2d 880 (D.C. Cir. 1980) 10

Gates v. Collier,
616 F.2d 1268 (5th Cir. 1980) 3

Hutto v. Finney,
437 U.S. 678 (1978) 12

Lew Wenzel & Co. v. London Litho Supply Co.,
563 F.2d 1367 (9th Cir. 1977) 3

Mt. Hood Stages, Inc. v. Greyhound Corp.,
616 F.2d 394 (9th Cir.), *cert. denied,*
101 S.Ct. 99 (1980) 3

Perkins v. Standard Oil of California,
487 F.2d 672 (9th Cir. 1973) 3

Ramey v. Cincinnati Enquirer, Inc.,
508 F.2d 1188 (6th Cir. 1974), *cert. denied,*
422 U.S. 1048 (1975) 3

Rocap v. Indiek,
539 F.2d 174 (D.C. Cir. 1976) 8

Roswell v. LaSalle National Bank,
101 S. Ct. 1221 (1981) 4

United States v. United Continental Tuna Corp.,
425 U.S. 164 (1976) 7

Rules: Page

Fed. R. Civ. P. 62(e) 10

Statutes:

5 U.S.C. § 552(a)(4)(B) 2

5 U.S.C. § 552(a)(4)(D) 9

5 U.S.C. § 552 (a)(4)(E) 5, 8, 9

5 U.S.C. § 552(a)(6)(A) 9

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1961 ..... *passim*

28 U.S.C. § 2411 6

28 U.S.C. § 2516 6

31 U.S.C. 724a 6

42 U.S.C. § 1983 11

42 U.S.C. § 1988 11

5 Stat. 518 7

P.L. 96-481, 94 Stat. 2325 11

Other Authorities:

P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechler's The Federal Courts and the Federal System*, (2d ed. 1973) 7

Berger, *Court Awarded Attorneys' Fees: What Is Reasonable?*, 126 U. Pa. L. Rev. 281 (1977) 11

7 Op. Atty. Gen. 523 (1855) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

NORMAN E. HOLLY,

Petitioner,

v.

ROBERT E. CHASEN

and

UNITED STATES CUSTOMS SERVICE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTION

The judgment sought to be reviewed (Appendix, *infra,* at 9a) is dated January 7, 1981, and was entered by the court of appeals on that date. On April 2, 1981, Chief Justice Warren E. Burger entered an order extending the time for petitioner to file a petition for a writ of certiorari

to and including May 7, 1981. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1961 provides:

Interest

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

STATEMENT OF THE CASE

Petitioner brought this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, when the United States Customs Service refused to release documents which he had requested many months earlier. Jurisdiction was based on 5 U.S.C. § 552(a)(4)(B). The respondents released some of the documents, and the parties cross-moved for summary judgment as to those which were still in dispute. On March 29, 1976, the district court filed a memorandum and order resolving almost every issue in petitioner's favor.

Since petitioner had substantially prevailed, the district court granted his request for $620 in attorneys' fees for the time he spent on the litigation. 72 F.R.D. 115 (D.D.C. 1976). The Government appealed the award, contending that sovereign immunity barred the payment of fees to a *pro se* litigant, particularly one who was not an attorney.

The court of appeals affirmed the award without opinion. *Holly v. Acree,* 569 F.2d 160 (D.C. Cir. 1977).

One narrow issue remained to be decided. The Government did not pay petitioner the $620 due him until July 25, 1978, nearly two years after the district court made the award. Therefore, pursuant to 28 U.S.C. § 1961, he requested interest, at the 6% rate allowable in the District of Columbia, for the period between when the award was made and when it was finally satisfied. When defendants would not consent to pay the $70.31 in controversy, he filed a motion for allowance of post-judgment interest. The respondents opposed the motion, once again raising the defense of sovereign immunity. The district court agreed with petitioner's contention that 28 U.S.C. § 1961, which states that interest "shall be allowed on any money judgment in a civil case recovered in a district court," is applicable to judgments against the United States. 1a-2a.

The Government took a second appeal, and on January 7, 1981, the court of appeals reversed the award of interest. 3a-8a. The court held that 28 U.S.C. § 1961 does not constitute an express waiver of sovereign immunity, and that therefore no interest could be allowed on petitioner's judgment.[1]

---

[1]The court of appeals did not reach respondents' alternative argument that a judgment for attorneys' fees is not a "money judgment" within the meaning of 28 U.S.C. § 1961. However, the cases have uniformly held that such an award does bear interest under section 1961. *Gates v. Collier,* 616 F.2d 1268 (5th Cir. 1980); *Mt. Hood Stages, Inc. v. Greyhound Corp.,* 616 F.2d 394, 406 n.10 (9th Cir.), *cert. denied,* 101 S. Ct. 99 (1980); *City of Detroit v. Grinnell Corp.,* 575 F.2d 1009 (2d Cir. 1978); *Lew Wenzel & Co. v. London Litho Supply Co.,* 563 F.2d 1367 (9th Cir. 1977); *Ramey v. Cincinnati Enquirer, Inc.,* 508 F.2d 1188, 1198 (6th Cir. 1974), *cert. denied,* 422 U.S. 1048 (1975); *Perkins v. Standard Oil of California,* 487 F.2d 672, 675 (9th Cir. 1973). *But cf. Carpa, Inc. v. Ward Foods, Inc.,* 567 F.2d 1316, 1321-23 (5th Cir. 1978).

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This petition involves only $70.31, but, as the Government recognized in pursuing its appeal to the D.C. Circuit, there is far more at stake than that small sum. Not only would the ruling below preclude the award of interest on attorneys' fees in Freedom of Information Act cases, no matter how large the fee or how long or unreasonable the delay, but its rationale would extend to other areas such as Title VII cases involving federal agencies and may even apply to judgments for back pay, as well as to those for statutory attorneys' fees. To appreciate the ramifications of the ruling, it is necessary to examine three separate strands – the broad statute allowing post-judgment interest, 28 U.S.C. § 1961; the doctrine of sovereign immunity; and the recent advent of statutory attorneys' fees under the FOIA and elsewhere.

The analysis must begin with the only section in Title 28 which speaks directly to the point, 28 U.S.C. § 1961. It provides in relevant part:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court.

If petitioner's reliance on the clear language of this statute is justified, then the United States is obligated to pay interest on all judgments, as other litigants in the federal courts do.

"The starting point of [this] inquiry is the plain language of the statute itself." *Roswell v. LaSalle National Bank,* 101 S. Ct. 1221, 1228 (1981); *Reiter v. Sonotone Corp.,* 442 U.S. 330, 337 (1979). That language is unequivocal, directing that interest "shall be paid on *any* money judgment in a civil case recovered in a district court." (Em-

phasis added). At no point in its opinion does the court of appeals address this specific language or explain why it should not be given effect. There is no specific exclusion in section 1961 or elsewhere that allows the United States to be treated more favorably than other defendants who do not promptly pay judgments. Thus, unless there is an implied exception which overrides section 1961, the inquiry should be at an end.

Both respondents and the court of appeals found such an implied exception in the doctrine of sovereign immunity. There is , of course, no question as to either the general applicability of the doctrine concerning money judgments against the United States, nor to the fact that there has been an express waiver of sovereign immunity in 5 U.S.C. § 552(a)(4)(E) that permitted petitioner to secure a judgment of $620 for attorneys' fees against the Government. But the court of appeals found that because the waiver in the FOIA did not include with the phrase "reasonable attorney fees" a specific authorization to pay post-judgment interest as well, interest is not permitted. In reaching that conclusion, it erroneously extended to this area two separate concepts from other areas of the law.

The first such extension involves the numerous cases, not disputed by petitioner, which base a denial of *pre*-judgment interest against the United States on sovereign immunity grounds. 6a. Those decisions, however, are irrelevant here because the statute relied on by petitioners, 28 U.S.C. § 1961, covers only *post*-judgment interest and hence would have been irrelevant in those cases. If the doctrine of sovereign immunity is to be held to be so forceful as to require Congress, in effect, to expressly state in a statute written to cover "any civil case" in district court that it also applies to the United States, this Court should so rule in order to make clear to Congress what it

must do to eliminate sovereign immunity in any particular instance.[2]

The second source for the appellate court's conclusion was the existence of three other statutes, all enacted subsequent to the predecessor of section 1961, which expressly provide for interest on judgments against the United States in situations other than those involved here: 28 U.S.C. § 2411, 28 U.S.C. § 2516, and 31 U.S.C. § 724a. According to the court,

> If 28 U.S.C. § 1961 is read to confer an automatic entitlement to interest at the rate provided by state law on all civil judgments against the United States, these very detailed statutory provisions all become superfluous.

8a. But that conclusion is the result of the court's error in equating the existence of other specific statutes (which, petitioner concedes, override section 1961 in the specific situations described in them) with the much different proposition that their existence should also override the broad language of section 1961 in cases involving the United States where the other statutes are not applicable.

The difference in approaches to statutory interpretation can be seen by the different provisions that petitioner and

---

[2]The court of appeals gives great weight to the fact that, despite the decisions referred to in the text, Congress never amended the language of 28 U.S.C. § 1961 or its predecessor statute. The court of appeals states that "Congress must have been aware of these decisions," and that therefore through inaction "Congress strongly indicated its approval of the construction placed upon the statute by the courts." 7a. Apart from the questionable inference of "acquiescence by silence" which the court attributes to Congress, as discussed in the text virtually all of the cases relied on by the court of appeals involved only *claims* against the United States, not *judgments*. Therefore section 1961 was inapplicable by its terms, and hence not in need of amendment.

the court of appeals would engraft onto section 1961 to take into account the other specific statutes. Petitioner would add to section 1961 the following proviso: "Provided that where another statute expressly covers a particular case, it shall control." The court of appeals, on the other hand, would add "Provided that where another statute expressly covers a particular kind of case, category of defendant, or type of judgment, this section shall not apply to a similar kind of case, category of defendant, or type of judgment, even if the express statute does not control." Thus, the court below adopted a canon of construction — the implied repealer of an express statute — that is at odds with the "cardinal principle of statutory construction that repeals by implication are not favored." *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976).

To avoid this canon, the court sought to establish, in effect, that there was nothing to repeal. Thus, it observed that when the predecessor of section 1961 was passed in 1842 "Congress had not yet provided the federal district courts with jurisdiction to hear monetary claims against the United States. Accordingly, there were no judgments against the federal government upon which interest could run." 7a. The flaw in the court's analysis is the assumption that because there was no "general grant of jurisdiction" for the prosecution of money claims against the United States (7a), there were no claims at all which could be brought. To the contrary, Congress had permitted actions to be brought against the United States on certain types of claims. *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 1326 & n.2 (2d ed. 1973). Moreover, shortly after the passage of 5 Stat. 518 (the predecessor of section 1961), Attorney General Cushing recognized that it permitted interest to be recovered against the United States. 7 Op. Atty. Gen. 523, 531 (1855).

The third strand in this case, the fact that the judgment was for attorneys' fees, also has an important bearing on the outcome which the court of appeals overlooked. Under the traditional American rule, courts are not free to award attorneys' fees to the prevailing party except in a few narrowly defined classes of cases. *See Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975). In recent years Congress has recognized the need to allow prevailing parties to recover their attorneys' fees in order to advance what it considered to be important public policies. Some of these statutes, including the FOIA, permit recovery of counsel fees against the United States.

The attorneys' fees aspect is important for two separate reasons. First, to the extent that the policy requiring an express waiver of sovereign immunity is based on a desire to ensure that Congress focuses on the budgetary impact, that policy is met here because Congress specifically waived sovereign immunity and made the United States liable for attorneys' fees in FOIA actions. Admittedly, Congress did not expressly extend the waiver to interest on judgments for fees, but given the relation between the two items and the absence of any indication of why section 1961 should not apply, to deny interest on sovereign immunity grounds would allow the 6% tail to wag the 100% dog.

Second, Congress had waived sovereign immunity when it enacted the FOIA in 1966 and created an independent action on behalf of any person whose request was wrongfully denied. In 1974, however, it went further and added a specific statutory exception to the American rule in 5 U.S.C. § 552(a)(4)(E) to ensure that there would be sufficient incentives to use the FOIA in the face of agency intransigence. *Rocap v. Indiek,* 539 F.2d 174, 179 (D.C. Cir. 1976). For a Congress that was not only willing to

allow attorneys' fees, but also to impose strict time limits for an agency to respond to all FOIA requests, 5 U.S.C. § 552(a)(6)(A), and to require expeditious treatment in all courts, 5 U.S.C. § 552(a)(4)(D), it is inconceivable that it would have also given that same agency license to delay payment of those fees indefinitely by denying the plaintiff interest on his judgment for counsel fees. It is only with the clearest kind of evidence relating to the history of section 1961 or of section 552(a)(4)(E), which is admittedly not present, that this Court should sanction the contrary interpretation of the court of appeals.

It is also important to recognize that the interpretation of section 1961 adopted by the court of appeals will impair the fair and efficient operation of the judicial system. No court system can operate smoothly unless its judgments, including money judgments, are fully complied with. Once judgment has been entered on the merits, there are important social purposes to be served by assessing interest against the defendant if his unsuccessful appeal delays payment of that judgment. Since one party or the other must bear the costs attributable to the loss of the use of the money during the pendency of an appeal, fairness dictates that a plaintiff whose claim is ultimately upheld on appeal should not be the one to suffer because of his opponent's efforts to overturn the judgment.

Potential liability for post-judgment interest can also play an important role in discouraging the non-meritorious appeals which would otherwise burden the courts. A defendant who can delay paying a judgment simply by appealing will have a considerable incentive to take an appeal, even if it is extremely unlikely to be successful. It is the function of such post-judgment interest to make sure that there is no such incentive to appeal solely

for the purpose of gaining the use of the money until the appeal can be decided.[3] Moreover, unlike in a case against a private party, where a successful litigant can obtain protection against the loss of the use of the money during the pendency of an appeal by requiring a bond providing for interest, or by levying execution, these protective measures are not available in a case against the Government. *See* Fed. R. Civ. P. 62(e).

Petitioner recognizes that it is not the function of this Court to sit merely to correct error, nor does this Court often agree to hear the first case from a court of appeals squarely presenting an issue of federal law. Nonetheless, petitioner believes that this case presents far wider issues that the one which is specifically before the Court. Indeed, the Government was so concerned by the opinion of a single district judge involving $70.31, that it took the case to the D.C. Circuit, with the obvious hope of setting a broad precedent in the Circuit where much of the current FOIA litigation takes place. While there is now a precedent from one panel of that Court, other plaintiffs may seek to establish an intra-circuit conflict, particularly where the delay has been several years and the fee award is sizable. *See, e.g., Copeland v. Marshall,* 641 F.2d 880 (D.C. Cir. 1980) (multiyear delay involving $160,000 in fees). And, of course, successful litigants in other circuits will not be bound by this decision and may well seek interest after an unsuccessful Government appeal or simply an inordinate delay in payment while deciding not to appeal.

---

[3]When market interest rates are considerably above statutory rates for post-judgment interest, as they are now, even an award of interest does not completely compensate a plaintiff who has a lengthy wait before receiving payment of a judgment. If post-judgment interest is not paid at all, the harm to the injured party is even greater, and there is a corresponding incentive for the judgment debtor to seek delay through the appellate process.

The case for review by this Court is made much stronger by the fact that the rationale of this decision, based as it is on an implied repealer or exception founded on sovereign immunity, could be extended to other areas as well. Thus, under Title VII the United States is liable for attorneys' fees to a prevailing party just as a private defendant would be, and yet the decision below can be read (and surely will be argued by the Government) to deny interest on unpaid fee awards against the United States under that statute as well as under the FOIA.[4] In fact, even a n. ›ney judgment for back pay could be argued to by subject to the same exception to section 1961, thus providing further potential issues for litigation. The impact of the court of appeals' decision is further expanded by the enactment of Title II of the Equal Access to Justice Act, P.L. 96-481, 94 Stat. 2325 (October 21, 1980). This legislation, which will become effective on October 1, 1981, will permit individuals and small businesses to recover attorneys' fees when the position taken by the United States in litigation is not "substantially justified." If allowed to stand, the decision of the court of appeals would prevent the recovery of interest on such attorneys' fee awards, no matter how long the United States delayed payment.

If allowed to stand, the sovereign immunity rationale may extend beyond the federal government. State agencies are frequent defendants in Title VII cases, and the back pay and attorneys' fees provisions parallel those for the federal government. Similarly, they are also defendants in cases awarding damages under, for example, 42 U.S.C. § 1983, and allowing attorneys' fees under 42 U.S.C. § 1988. While there are plainly distinctions to be made be-

---

[4]As of 1977, there were at least 75 federal statutes authorizing awards of attorneys' fees, many of them against the United States. *See* Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 303 & n.104 (1977).

tween those governmental units and the United States, they are not so clear as to foreclose litigation over the issue of whether application of section 1961 to judgments against such entities is barred by the Eleventh Amendment. *See Hutto v. Finney,* 437 U.S. 678 (1978). In short, a decision not to review this case will shift the burden to the lower federal courts and, in all probability, only postpone the day when conflicts among the circuits will necessitate the Court's examination of the question presented here.

Finally, there is another reason why this Court should accept this case and settle the question without further litigation in the lower courts. As respondents and the court of appeals recognize, the ultimate decision on whether the government shall pay interest rests with Congress, and there are a number of equitable factors that support petitioner's reading of section 1961. *See* 8a and pp. 9-10, *supra.* But the willingness of Congress to address this issue (which might entail a detailed examination of its possibly extensive ramifications) is significantly reduced without an authoritative decision from this Court. Thus, a prompt ruling on the question by this Court can lead to a speedier final resolution of this matter while simultaneously reducing the burden on judicial resources.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN CARY SIMS
(Counsel of Record)
ALAN B. MORRISON
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for Petitioner

May 7, 1981

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORMAN E. HOLLY, *Plaintiff,*	)	
v.	)	Civil Action No. 75-2116
ROBERT E. CHASEN,* et al., *Defendants.*	)	*Filed Feb. 2 1979* *JAMES F. DAVEY, Clerk*

MEMORANDUM AND ORDER

The sole remaining issue in this Freedom of Information Act case is whether the non-lawyer plaintiff, Norman Holly, is entitled to post-judgment interest on the attorneys' fees awarded to him by this Court on September 3, 1976.

Plaintiff succeeded in this suit in forcing the release of all but a few lines of the documents he sought, and this Court granted him an award of $620 in attorneys' fees. The government appealed the award. The Court of Appeals affirmed this Court's award on December 5, 1977, and denied rehearing.

Plaintiff argues that 28 U.S.C. § 1961 (1959) mandates that he receive interest on his attorneys' fees award from December 3, 1976, until the date the government satisfies this judgment. The statute provides in relevant part:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court.

The defendant counters that interest cannot be recovered against the United States unless it is authorized

*Defendant Vernon B. Acree, who was sued in his official capacity as the Commissioner of Customs, has been succeeded in office by Robert E. Chasen. Mr. Chasen is accordingly substituted as a party as required by Fed. R. Civ. P. 25(d)(1).

by an express statutory or constitutional provision, and that the cases cited by plaintiff involve only judgments against private litigants.

This Court must agree with defendant that the United States is not liable for pre-judgment interest. However, 28 U.S.C. § 1961 seems to apply in mandatory terms to all *judgments* rendered against private or governmental litigants in federal district courts. It seems to be explicit statutory authority to tax interest against the United States, if any such explicit authority is required in the post-judgment period.

The Court has been unable to find any legislative history which would indicate this provision intended to exclude judgments against the United States or governmental entities. One district court allowed interest on back wages to be taxed against the Postal Service, in part because it could find nothing in the Back Pay Act or any federal statute which would exclude the Postal Service from coverage of 28 U.S.C. § 1961. *White v. Bloomberg,* 360 F. Supp. 58, 63 (D.Md. 1973) The Court finds convincing plaintiff's argument that attorneys' fees constitute a money judgment just as much as any other item of damage. *Perkins v. Standard Oil Co. of California,* 487 F.2d 672, 675 (9th Cir. 1973).

In accordance with the above, it is this 1 day of February 1979,

ORDERED, that the plaintiff be awarded interest of six per cent per annum on this court's original award of attorneys' fees from September 3, 1976, the date on which his claim was reduced to a money judgment, until such time as this judgment is satisfied.

/s/William B. Bryant

UNITED STATES DISTRICT JUDGE

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1492

NORMAN E. HOLLY

v.

ROBERT E. CHASEN, COMMISSIONER OF CUSTOMS, ET AL., APPELLANTS

Appeal from the United States District Court for the District of Columbia

(D.C. Civil No. 75-2116)

Argued: May 7, 1980
Decided January 7, 1981

Judgment entered this date

Linda M. Cole, Attorney, Department of Justice with whom *Alice Daniel*, Assistant Attorney General, *Carl S. Rauh*, United States Attorney at the time the brief was filed, and *William Kanter*, Attorney, Department of Justice, were on the brief for appellants.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

John Cary Sims with whom *Alan B. Morrison* was on the brief for appellee.

Ann K. Macrory and *James T. Kilbreth, III* were on the brief for *Amicus Curiae* urging affirmance.

Before: McGOWAN, ROBINSON and ROBB, *Circuit Judges*

Opinion: *Per Curiam.*

Per Curiam: The question presented on this appeal is whether in a Freedom of Information Act case section 1961 of Title 28 of the U.S. Code authorizes the taxation of interest upon a judgment against the United States for attorneys' fees. We hold that it does not.

In December of 1975 our appellee Norman E. Holly filed suit in the District Court to obtain agency records under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* Holly, a layman acting without counsel, succeeded in obtaining most of the requested documents. Relying upon 5 U.S.C. § 552(a)(4)(E) the District Court taxed attorneys' fees and costs against the United States. The court based its fee award upon Holly's estimates of "opportunity cost" of his time.

The government appealed the fee award on the ground that the Freedom of Information act does not authorize an award of attorneys' fees to a layman acting *pro se*. By order, without oral argument, this court affirmed the award. *Holly v. Chasen*, 186 U.S. App. D.C. 329, 569 F.2d 160 (1977).

Thereafter Holly asked the District Court to require the government to pay interest upon his award of attorneys' fees, for the period between the date of the award and the date of payment. The court granted the request, and ordered the payment of interest at 6% from the date of the judgment for attorneys' fees until such time as the judgment was satisfied. The court based this award upon 28

U.S.C. § 1961 which provides in pertinent part: "Interest shall be allowed on any money judgment in a civil case recovered in a district court." In a memorandum opinion the court stated:

> The defendant counters that interest cannot be recovered against the United States unless it is authorized by an express statutory or constitutional provision, and that the cases cited by plaintiff involve only judgments against private litigants.
>
> This court must agree with defendant that the United States is not liable for pre-judgment interest. However, 28 U.S.C. § 1961 seems to apply in mandatory terms to all *judgments* rendered against private or governmental litigants in federal district courts. It seems to be explicit statutory authority to tax interest against the United States, if any such explicit authority is required in the post-judgment period.
>
> The Court has been unable to find any legislative history which would indicate this provision intended to exclude judgments against the United States or governmental entities. [Emphasis in original]

(Appellant's App. 19, 20) The government appeals from this ruling.

A statute authorizing the recovery of interest on judgments in civil cases in district courts has been on the books since 1842, and the operative language of the statute has remained substantially unchanged for a hundred and thirty-eight years. The Act of August 23, 1842, ch. 118, § 8, 5 Stat. 518 provided "That on all judgments in civil cases, hereafter recovered in the circuit or district courts of the United States, interest shall be allowed . . . to be calculated from the date of the judgment. . . ." The Act of March 3, 1911, ch. 231, § 291, 36 Stat. 1167, codified at 28 U.S.C. § 811 (1940) provided "Interest shall be allowed on all judgments in civil causes, recovered in a district court . . . and it shall be calculated from the date of the judgment. . . ." The Act of June 25, 1948, ch. 646, 62 Stat. 957,

28 U.S.C. § 1961 provides "Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment. . . ." Until now no court has ever suggested that the general language in these statutes, authorizing the allowance of interest on judgments, permitted the taxation of interest on a judgment against the United States. On the contrary, the rule has always been that in the absence of constitutional requirements the federal courts cannot award interest upon a claim or judgment against the United States unless there has been an express waiver of sovereign immunity. *United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951); *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947); *United States v. Goltra*, 312 U.S. 203, 207 (1941); *Smyth v. United States*, 302 U.S. 329, 353 (1937); *United States ex rel. Angarica v. Bayard*, 127 U.S. 251, 260 (1888). *See Blake v. Califano*, ___ U.S. App. D.C. ___, 626 F.2d 891 (1980). The waiver cannot be by implication or by use of ambiguous language; it must be express, and it must be strictly construed. *Tillson v. United States*, 100 U.S. 43, 46 (1879); *Thayer-West Point Hotel Co., supra*; *United States v. New York Rayon Importing Co.*, 329 U.S. 654, 658–59 (1947); *United States v. Sherwood*, 312 U.S. 584, 589–90 (1941). *See United States v. Testan*, 424 U.S. 392, 399 (1976); *Fitzgerald v. United States Civil Service Comm'n*, 180 U.S. App. D.C. 327, 330, 554 F.2d 1186, 1189 (1977). The rule makes no distinction between prejudgment and postjudgment awards, nor is there any reason for such a distinction; the bar of sovereign immunity applies to them both. *United States v. State of Maryland*, 121 U.S. App. D.C. 258, 261, 349 F.2d 693, 696 (1965); *Anglin & Stevenson v. United States*, 160 F.2d 670, 672 (10th Cir. 1947). The District Court focused on the wrong question when it searched for "any legislative history which would indicate [28 U.S.C. § 1961] intended to exclude judgments against the United States. . . ." [Appellant's App. 20] The court should have looked for any

express waiver of sovereign immunity. Had the court done so it could have found no express waiver, and would have reached the proper conclusion that interest on Holly's judgment could not be allowed.

In their brief in this court counsel for Holly assert "there is absolutely no extant legislative history which explains the Congressional motivation in 1842, when the predecessor statute of section 1961 was passed." [Appellee's Br. at 12] The apparent implication is that Congress in 1842 did not intend to exempt the United States from the obligation to pay interest on judgments. The flaw in this argument is that in 1842 Congress had not yet provided the federal district courts with jurisdiction to hear monetary claims against the United States. Accordingly, there were no judgments against the federal government upon which interest could run. The first general grant of jurisdiction came in 1887 with the passage of the TUCKER ACT, 24 Stat. § 505 *et seq.* Congress included a separate interest provision in the original version of the Tucker Act, 24 Stat. § 507, demonstrating that Congress did not believe that the 1842 statute would require the payment of interest in the event that the newly created cause of action resulted in a money judgment against the United States. The Tucker Act provision for interest has evolved into the present 28 U.S.C. § 2411(b).

As we have said, the 1842 statute has remained substantially unchanged since its enactment. The Act of June 25, 1948, now 28 U.S.C. § 1961, made only verbal changes in the previous statute, enacted in 1911 and codified in 28 U.S.C. § 811 (1940). In the interim between 1911 and 1948 the courts consistently held that sovereign immunity exempted the United States from the statutory provision for the payment of interest on judgments. *See* cases cited *supra*. Although Congress must have been aware of these decisions, Congress made no change in the statutory language. Thus Congress strongly indicated its approval of the construction placed upon the statute by the courts.

Further support for our conclusion is found in the three specific statutes dealing with the matter of interest on judgments against the United States. These statutes are 28 U.S.C. § 2411, 28 U.S.C. § 2516, and 31 U.S.C. § 724(a). They (1) designate which claims against the United States will bear interest when reduced to judgment, (2) spell out the procedures which a successful plaintiff must follow in order to perfect his entitlement to interest, (3) set the rate of interest which the United States will pay on a given kind of judgment and (4) establish the time when interest will start to run and the time when it will stop. If 28 U.S.C. § 1961 is read to confer an automatic entitlement to interest at the rate provided by state law on all civil judgments against the United States, these very detailed statutory provisions will all become superfluous.

The equitable considerations which counsel earnestly press upon us should be presented to the Congress, not to this court. We suggest however that the possibility of a substantial delay in the payment of a fee is a factor which counsel may wish to bring to the court's attention when submitting his application for compensation.

We hold that the District Court had no authority to award interest on Holly's fee. The judgment of the District Court awarding interest is

Reversed.

United States Court Of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1492 September Term, 1980
Norman E. Holly Civil Action No. 75-2116

Filed JAN 07 1981
GEORGE A. FISHER
CLERK

v.

Robert E. Chasen, Commissioner of Customs, et al., Appellants

Appeal from the United States District Court for the District of Columbia.

Before: McGOWAN, ROBINSON and ROBB, Circuit Judges

JUDGMENT

This cause came on the be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
/s/ George A. Fisher
George A. Fisher
Clerk

Date: January 7, 1981
Opinion Per Curiam

Office-Supreme Court, U.S.
FILED
JUN 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1871

In the Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN E. HOLLY, PETITIONER

v.

ROBERT E. CHASEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

WILLIAM KANTER
LINDA COLE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether 28 U.S.C. 1961 authorizes the assessment of interest on a judgment against the United States.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 2

Conclusion 5

TABLE OF AUTHORITIES

Cases:

Anglin & Stevenson v. *United States*, 160 F. 2d 670, cert denied, 331 U.S. 834 2

Boston Sand and Gravel Co. v. *United States*, 278 U.S. 41 4

FPC v. *Tuscarora Indian Nation*, 362 U.S. 99 ... 3

Hancock v. *Train*, 426 U.S. 167 3

Huntley v. *Southern Oregon Sales*, 104 F. 2d 153 5

Leiter Minerals, Inc. v. *United States*, 352 U.S. 220 3

Reed v. *Howbert*, 77 F. 2d 227 5

Richerson v. *Jones*, 551 F. 2d 918 4-5

United States v. *Alcea Band of Tillamooks*, 341 U.S. 48 2

United States v. *New York Ravon Importing Co.*, 329 U.S. 654 ..... 2, 3

United States v. *Sherman*, 98 U.S. 565 ..... 2, 4

United States v. *Testan*, 424 U.S. 392 3

Page

Cases—(Continued):

United States v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 2

United States v. *United Mine Workers*, 330 U.S. 258 3

Statutes:

Act of Aug. 23, 1842, ch. 188, Section 8, 5 Stat. 518 3

Act of Mar. 3, 1887, ch. 359, Section 1, 24 Stat. 505 4

Act of Mar. 3, 1911, ch. 231, Section 291, 36 Stat. 1167, codified at 28 U.S.C. (1940 ed.) 811 3

Freedom of Information Act (FOIA), 5 U.S.C. 552 1

5 U.S.C. 552(a)(4)(E) 2

Tucker Act, 28 U.S.C. 1491 4

26 U.S.C. 7426 4

28 U.S.C. 1961 ..... 2, 3, 4

28 U.S.C. 2411(a) 4

28 U.S.C. 2411(b) 4

28 U.S.C. 2516(b) 4

31 U.S.C. 227 4

31 U.S.C. 724a 4

46 U.S.C. 743 4

Page

Miscellaneous:

P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* (2d ed. 1973) ... 4

Note, *Interest on Judgments in the Federal Courts*, 64 Yale L.J. 1019 (1955) 5

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1871

NORMAN E. HOLLY, PETITIONER

v.

ROBERT E. CHASEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-8a) is reported at 639 F. 2d 795. The opinion of the district court (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1981 (Pet. App. 9a). On April 2, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to May 7, 1981, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In December 1975, petitioner brought suit against respondents seeking to compel disclosure of certain agency records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. Petitioner, a non-lawyer, represented himself before

the district court. Because his suit triggered the release of most of the disputed information, petitioner claimed that he was eligible to be compensated for his time under the attorneys' fees provision of the FOIA, 5 U.S.C. 552(a)(4)(E). The district court awarded petitioner $620 in "attorneys' fees." *Holly* v. *Acree*, 72 F.R.D. 115 (D.D.C. 1976). The government appealed only on the question whether the FOIA authorizes an award of attorneys' fees to a non-lawyer acting pro se, and the court of appeals affirmed. *Holly* v. *Chasen*, 569 F. 2d 160 (D.C. Cir. 1977).

Thereafter, petitioner asked the district court to order the government to pay post-judgment interest on his award of attorneys' fees. The court granted the request, observing that "28 U.S.C. § 1961 seems to apply in mandatory terms to all *judgments* rendered against private or governmental litigants in federal district courts" (Pet. App. 2a) (emphasis in original). The court of appeals reversed (*id.* at 3a-8a), finding that Section 1961 does not contain an express waiver of sovereign immunity—a prerequisite to an award of interest against the United States (Pet. App. 6a-7a).

ARGUMENT

Petitioner contends (Pet. 4-12) that 28 U.S.C. 1961 requires the assessment of interest against the United States. This contention is without merit.

This Court has repeatedly held that the United States is not liable for interest in the absence of an express waiver of sovereign immunity. See, *e.g.*, *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951); *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947). And, contrary to petitioner's contention (Pet. 5-6), this rule applies as well to interest imposed after the entry of a judgment. See *United States* v. *New York Rayon Importing Co.*, 329 U.S. 654 (1947); *United States* v. *Sherman*, 98 U.S. 565 (1879); *Anglin & Stevenson* v. *United States*, 160 F. 2d 670, 672 (10th Cir.), cert. denied, 331 U.S. 834 (1947).

Indeed, in *New York Rayon*, the Court rejected the contention that the sovereign immunity of the United States does not extend to interest after a claim has been reduced to judgment, noting that the traditional rule preventing the taxation of interest against the United States "is a complete one covering all types of claims, including those arising out of pre-existing judgments." 329 U.S. at 661.

It is well established that a waiver of sovereign immunity must be "unequivocally expressed." *United States* v. *Testan*, 424 U.S. 392, 399 (1976); see also *United States* v. *New York Rayon Importing Co., supra*, 329 U.S. at 659. There can be little doubt that the court of appeals correctly held that the general language of 28 U.S.C. 1961 does not meet this test. The statute contains no affirmative terms that could constitute an express waiver of sovereign immunity and contains no indication whatsoever of an intent to include judgments against the United States.[1]

Moreover, the background of 28 U.S.C. 1961 demonstrates that Congress did not intend to waive the government's historic immunity from claims for interest. The statute was first enacted in 1842, and has remained substantially the same since. Act of Aug. 23, 1842, ch. 188, Section 8, 5 Stat. 518.[2] In 1842, persons with grievances against the

---

[1]There is no merit to petitioner's suggestion (Pet. 4-5) that sovereign immunity cannot apply here because 28 U.S.C. 1961 contains no explicit exception for the United States. It is well settled that "general statutes imposing restrictions do not apply to the Government itself without a clear expression to that effect." *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960). See also, *e.g.*, *Hancock* v. *Train*, 426 U.S. 167, 179 (1976); *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 224-225 (1957); *United States* v. *United Mine Workers*, 330 U.S. 258, 271-272 (1947). The same rule applies to a general statute imposing monetary liability, from which the sovereign is ordinarily immune.

[2]The wording of the statute was changed slightly in 1911, Act of Mar. 3, 1911, ch. 231, Section 291, 36 Stat. 1167, codified at 28 U.S.C. (1940 ed.) 811, and then again to its present form as 28 U.S.C. 1961.

United States could not file a lawsuit but could obtain relief only by means of a private bill in Congress. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 1326 (2d ed. 1973) (hereinafter cited as *Hart & Wechsler*). Congress did not authorize the federal district courts to entertain suits against the United States until 1887, when it passed the Tucker Act, 28 U.S.C. 1491 (see Act of Mar. 3, 1887, ch. 359, Section 1, 24 Stat. 505). Clearly, Congress could not have contemplated that the general language of 28 U.S.C. 1961 would authorize the imposition of interest against the United States if a monetary judgment could not have been obtained against the United States when the statute was passed.[3]

Finally, as the court of appeals noted (Pet. App. 8a), Congress has enacted several specific statutes authorizing the payment of interest on judgments against the United States. See 28 U.S.C. 2411(b); 28 U.S.C. 2516(b); 31 U.S.C. 724a. See also 26 U.S.C. 7426; 28 U.S.C. 2411(a); 31 U.S.C. 227; 46 U.S.C. 743. Congress' enactment of these explicit provisions subsequent to the passage of 28 U.S.C. 1961 provides further evidence that it did not intend the general interest statute to apply to judgments against the United States.

For these reasons, the courts have uniformly rejected the contention that 28 U.S.C. 1961, or its predecessors, authorizes the imposition of interest against the United States.

---

[3]As petitioner notes (Pet. 7), in a few "exceptional" instances Congress passed a private bill that did not grant the relief requested but rather authorized the claimant to bring a particular lawsuit in federal district court. *Hart & Wechsler, supra*, at 1326 n.2. These bills were so unusual that they can hardly have been a consideration in the passage of the predecessor to 28 U.S.C. 1961. Indeed, this Court has explicitly held that interest may not be assessed on a judgment against the United States resulting from a suit brought under such a private bill. *Boston Sand and Gravel Co.* v. *United States*, 278 U.S. 41 (1928).

See *United States* v. *Sherman, supra; Richerson* v. *Jones*, 551 F. 2d 918, 925 (3d Cir. 1977); *Huntley* v. *Southern Oregon Sales*, 104 F. 2d 153, 154-155 (9th Cir. 1939); *Reed* v. *Howbert*, 77 F. 2d 227, 229 (10th Cir. 1935). Thus, the question presented here is one that has long been settled, and it does not warrant review by this Court. See Note, *Interest on Judgments in the Federal Courts*, 64 Yale L.J. 1019, 1019-1020 n.6 (1955).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

WILLIAM KANTER
LINDA COLE
Attorneys

JUNE 1981

DOJ-1981-06

Office-Supreme Court, U.S.
FILED
JUL 23 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1871

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN E. HOLLY,

Petitioner,

v.

ROBERT E. CHASEN

and

UNITED STATES CUSTOMS SERVICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

JOHN CARY SIMS
(Counsel of Record)
ALAN B. MORRISON
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for Petitioner

July 23, 1981

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

TABLE OF AUTHORITIES

Cases: **Page**

Anglin & Stevenson v. United States,
160 F.2d 672 (10th Cir.), *cert. denied,*
331 U.S. 834 (1947) 2

Boston Sand & Gravel Co. v. United States,
278 U.S. 41 (1928) 3

Bulova Watch Co. v. United States,
365 U.S. 753 (1961) 4

Huntley v. Southern Oregon Sales, Inc.,
104 F.2d 153 (9th Cir. 1939) 4

Reed v. Howbert,
77 F.2d 227 (10th Cir. 1935) 4

Richerson v. Jones,
551 F.2d 918 (3d Cir. 1977) 3

United States v. New York Rayon Importing Co.,
329 U.S. 654 (1947) 2, 3

United States ex rel. McLeod v. Sherman,
98 U.S. 565 (1879) 4

Statutes:

28 U.S.C. § 1961 ..... *passim*

28 U.S.C. § 2411(a) 5

Other Authority:

7 Op. Atty. Gen. 523 (1855) 3, 4

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

NO. 80-1871

NORMAN E. HOLLY,

Petitioner,

v.

ROBERT E. CHASEN

and

UNITED STATES CUSTOMS SERVICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

The sole question presented by this petition is whether 28 U.S.C. § 1961, which directs that interest "shall be allowed on any money judgment in a civil case recovered in a district court," is applicable to judgments against the United States. The Government states that this question "has long been settled, and it does not warrant review by this Court." Brief in Opposition at 5. To the contrary, the very authorities cited by the Government establish that the question raised here has never before been decided, mak-

ing the issue an appropriate one for review by this Court. Not only would a decision by this Court settle an important question of federal law affecting many litigants, but a reversal of the decision below could significantly improve the operation of the federal courts by discouraging appeals interposed for reasons of delay.

1. The crucial distinction between *pre*-judgment and *post*-judgment interest is not recognized by the Government. The two different types of interest stand on entirely different footings because 28 U.S.C. § 1961 specifically authorizes the assessment of interest after judgment, but says nothing at all about interest prior to judgment. The Government cites several cases for the proposition that, despite the existence of 28 U.S.C. § 1961, pre-judgment and post-judgment interest against the United States are governed by identical principles. However, careful examination of those cases discloses that there is no holding concerning the liability of the United States for interest on judgments. The cases contain, at most, dictum which may be read as supporting the Government's position, but they do not undertake a detailed analysis of the impact of 28 U.S.C. § 1961 on the post-judgment interest question.

In *Anglin & Stevenson v. United States,* 160 F.2d 672 (10th Cir.), *cert. denied,* 331 U.S. 834 (1947), there was no challenge to the Government's claimed immunity from liability for interest. Since the only question raised was whether the judgment involved was in fact one against the United States, 160 F.2d at 672, the Court's cursory discussion of the predecessor of Section 1961 is mere dictum. *United States v. New York Rayon Importing Co.,* 329 U.S. 654 (1947), does not support the Government's position either. That case did not involve an attempt to collect post-judgment interest, but rather a new suit in the Court of Claims based on the Government's withholding of a

payment called for by a previous judgment of the Customs Court because of its uncertainty about the proper person to whom payment was to be made. Since this claim had not yet been reduced to judgment in the Court of Claims, post-judgment interest could not properly have been assessed by that court. In any event, it is clear on the face of Section 1961 that it has no application to judgments of the Customs Court or the Court of Claims, since the section is limited to judgments "recovered in a district court." *Boston Sand & Gravel Co. v. United States,* 278 U.S. 41 (1928), is also irrelevant to the question presented here, since in that case it was pre-judgment interest which was being sought. *Richerson v. Jones,* 551 F.2d 918, 925 (3d Cir. 1977), did deny post-judgment interest in a Title VII case involving back pay, but 28 U.S.C. § 1961 is not cited or discussed in the court's opinion.

2. The Government asserts that Section 1961 (which dates back to 1842, with only slight changes in wording) cannot apply to judgments against the United States, since general district court jurisdiction to hear suits against the United States did not exist before the Tucker Act was passed in 1887. Brief in Opposition at 3-4. However, the Government has ignored the unequivocal opinion of Attorney General Cushing, issued in 1855 and cited in the petition (p.7), stating that 5 Stat. 518 (the original predecessor of the present Section 1961) did provide for interest against the United States. *After* the passage of the 1842 interest statute, but *before* passage of the Tucker Act, the Attorney General wrote as follows:

> Congress has already made provision for interest, whether in favor of itself, or of individuals dealing with it, in general acts, where it has seen fit so to do. (See *ex. gr.* i Stat. at Large, p. 677; v Stat. at Large, p. 518.)

7 Op. Atty. Gen. 523, 531 (1855). Thus, while district court actions against the United States were not a frequent occurrence prior to passage of the Tucker Act, *see* Petition for Certiorari at 7; Brief in Opposition at 4 n. 3, such actions were brought on occasion, and those obtaining judgments were entitled to interest.

3. The Government points to the existence of a number of statutes allowing interest against the Government in particular types of cases, and it argues from their existence to the conclusion that Section 1961 was not intended to apply to the United States even when those statutes were admittedly irrelevant. Brief in Opposition at 4. There is no difficulty in harmonizing these statutes "for it is familiar law that a specific statute controls over a general one." *Bulova Watch Co. v. United States,* 365 U.S. 753, 758 (1961). Accordingly, the specific statutes applicable in tax cases, Tucker Act cases, and Federal Tort Claims Act cases control in those types of cases as to the rate of interest, the period for which interest is available, and any special conditions which must be met. Despite the existence of those provisions, it is Section 1961 which indicates how interest will be computed in the classes of cases not otherwise specifically provided for.

Petitioner's position is not in any way undercut by the tax cases cited by the Government at page 5 of its Brief in Opposition, since those cases merely involved a taxpayer's failure to come within the terms of the particular interest statute applicable in tax cases. *United States ex rel. McLeod v. Sherman,* 98 U.S. 565 (1879); *Huntley v. Southern Oregon Sales, Inc.,* 104 F.2d 153 (9th Cir. 1939); *Reed v. Howbert,* 77 F.2d 227 (10th Cir. 1935). When the predecessor of Section 1961 is mentioned at all in these cases, it is only as dictum or as a repetition of dictum from earlier cases. Despite the broad language sometimes

employed, the principle underlying the holdings of these cases is a narrow one which petitioner does not dispute: in tax cases, Section 1961 is pre-empted by the specific interest statute applicable to such cases. *See* 28 U.S.C. § 2411(a).

4. The statute which is involved here is of potential concern to many litigants who sue the United States or one of its officers or employees in the federal district courts. The interpretation of Section 1961 adopted by the Court of Appeals is contrary to the plain language of the statute, and it is unsupported by the holding of any prior decision. For the foregoing reasons, as well as those stated in the petition for certiorari, this Court should grant the petition and determine whether the Court of Appeals was correct in holding that, contrary to its language, Section 1961 does not apply to judgments against the United States.

Respectfully submitted,

John Cary Sims
(Counsel of Record)

Alan B. Morrison

Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

July 23, 1981